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Supreme Court, U.S.
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IN THE

Supreme Court of the United States

October Term, 1995

BILLY L. LEE,
Petitioner

v.

SARAH RENAE M. WALTON,
Respondent

Petition for Writ Of Certiorari
To The Court of Appeals for the
Ninth District of Texas at
Beaumont, Texas

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Introductory Statement

After this Court's decision in *McCarthy v. McCarthy*, 453 U.S. 210 (1981), Congress enacted the Uniformed Services Former Spouses Protection Act ("USFSPA") which in turn triggered a plethora of litigation seeking to divide military retirement pay between divorced spouses. Consequently, Congress amended the USFSPA in 1990 to provide that:

> ***[a] court may not treat retired pay as property*** in any proceeding to divide or partition any amount of retired pay ***of a member as property of the member and the member's spouse or former spouse if a final decree of divorce,*** dissolution, annulment, or legal separation ... affecting the member and the member's spouse or former spouse (A) ***was issued before June 25, 1981, and*** (B) ***did not treat (or reserve jurisdiction to treat)*** any amount of retired pay of the member as property of the member and the member's spouse or former spouse. (Emphasis added.)

Question Presented

Does the opinion of the Court of Appeals for the Ninth District of Texas at Beaumont which states that "under Texas law the courts automatically 'treat (or reserve jurisdiction to treat) any amount of retired pay of the member' by virtue of the laws governing ownership of undivided property, and subsequent partition is not precluded by federal law" preempt the USFSPA, as amended?

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SARAH RENAE M. WALTON,
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Petition for Writ Of Certiorari
To The Court of Appeals for the
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Beaumont, Texas

Petitioner, Billy L. Lee, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Court of Appeals for the Ninth District of Texas at Beaumont holding that Texas courts automatically treat (or reserve jurisdiction to treat) military retirement pay of the member as property of the member and the member's spouse.

OPINIONS BELOW

The opinion of the Court of Appeals for the Ninth District of Texas is reported as *Walton v. Lee,* 888 S.W.2d 604 (Tex.App.-Beaumont, 1994), and appears in Appendix A to this Petition. The unpublished written final summary judgment issued in favor of Petitioner by the 9th/2nd/9th Judicial District Court of Montgomery County, Texas appears in Appendix G.

JURISDICTION

The Court of Appeals' Opinion in this matter was filed on December 1, 1994. Petitioner filed a timely Motion for Rehearing. The Court of Appeals' denial of the Motion for Rehearing was issued on December 21, 1994 and is set forth in Appendix C. A timely Application for Writ of Error was filed with the Texas Supreme Court by Petitioner on January 20, 1995. The denial of the Application for Writ of Error was issued by the Texas Supreme Court on March 30, 1995, and is set forth in Appendix D. Petitioner filed his timely Motion for Rehearing with the Texas Supreme Court on April 11, 1995 which was denied by the Texas Supreme Court on April 27, 1995. The denial of the Motion for Rehearing is set forth in Appendix D. This Court's jurisdiction is invoked pursuant to Title 28, U.S.C. §1257.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Title 10, U.S.C. §1408, Uniform Services Former Spouses Protection Act, is set forth in Appendix E.

STATEMENT OF THE CASE

Petitioner enlisted in the military service on January 7, 1959 and was married to Respondent on August 3, 1961. The parties were divorced on November 4, 1976 in Montgomery County, Texas. Subsequently, on July 31, 1981 Petitioner retired and was discharged from the military. On January 21, 1992, Respondent brought an

action against Petitioner in the 9th/2nd/9th Judicial District Court of Texas, Montgomery, Texas, seeking a partition of Petitioner's military retirement pay. Petitioner moved for summary judgement contending that Respondent was barred from seeking partition of Petitioner's military retirement pay pursuant to the provisions of 10 U.S.C. §1408 where the decree of divorce was rendered and property settlement agreement was executed prior to June 25, 1981 and the judgment did not treat, or reserve jurisdiction to treat, Petitioner's military retirement pay as community property. The trial court granted Petitioner's motion and Respondent timely perfected appeal to the Court of Appeals for the Ninth District of Texas at Beaumont.

In his reply brief and at oral argument before the Court of Appeals, Petitioner relied on the 1990 amendment to the Uniform Services Former Spouses Protection Act (hereinafter referred to as "USFSPA"), 10 U.S.C. §1408(c)(1). Petitioner argued that the final decree of divorce was issued before June 25, 1981, and did not treat, or reserve jurisdiction to treat, any amount of retirement pay as property of Petitioner and Respondent and consequently, Respondent was precluded from seeking a partition of Petitioner's military retirement pay.

The Court of Appeals for the Ninth District of Texas delivered its opinion on December 1, 1994 and held that "under Texas law the courts automatically 'treat (or reserve jurisdiction to treat) any amount of retired pay of the member' by virtue of the laws governing ownership of undivided property, and subsequent partition is not precluded by federal law" and reversed the judgment of and remanded the case to the trial court. The dissenting opinion filed by the Chief Justice stated that to hold that Texas Courts automatically treat, or reserve jurisdiction to treat military retirement pay as property of the parties "is a fiction which flies in the face of the preemptive nature of Section 1408(c)(1)."

Petitioner filed an Application for Writ of Error to the Texas Supreme Court which was denied on March 30, 1995. On April 27, 1995, the Texas Supreme Court denied Petitioner's Motion for Rehearing.

REASONS FOR GRANTING THE WRIT

Certiorari should be granted because the issue presented is an important question of federal law which has not been, but should be, settled by this Court and the Opinion of the Court of Appeals conflicts with the decision of another Texas Court of Appeals and with the decisions of several other states.

The USFSPA was enacted in response to *McCarthy v. McCarthy*, 453 U.S. 210 (1981) and is clear and unambiguous. In pertinent part it states:

> [s]ubject to the limitations of this section, a court may treat disposable retired or retainer pay payable to a member for pay periods beginning after June 25, 1981, either as property solely of the member or as property of the member and his spouse in accordance with the law of the jurisdiction of such court.

Because of the myriad of cases being reopened as a result of the USFSPA, Congress again responded and amended the USFSPA in 1990. *Redus v. Redus*, 852 S.W.2d 94 (Tex.App.-Austin, 1993). The 1990 amendment is equally unambiguous. It states:

> [a] court may not treat retired pay as property in any proceeding to divide or partition any amount of retired pay of a member as property of the member and the member's spouse or former spouse if a final decree of divorce, dissolution, annulment, or legal separation (including a court ordered, ratified, or approved property settlement incident to such decree) affecting the member and the member's spouse or former spouse (A) was issued before June 25, 1981, and (B) did not treat (or reserve jurisdiction to treat) any amount of retired pay of the member as property of the member and the member's spouse or former spouse.

It cannot be questioned that Congress enacted the 1990 amendment to curb the plethora of litigation which ensued as a result of the passage of USFSPA. The legislative history reveals:

> [t]he committee is concerned because some state courts have been less than faithful in their adherence to the spirit of the law. The reopening of divorce cases finalized before the Supreme Court's decision in *McCarthy v. McCarthy* that did not divide retired pay continues to be a significant problem. Years after final divorce decrees have been issued, some state courts, particularly those in California, have reopened cases (through partition actions or otherwise) to award a share of retired pay. **Although Congress has twice stated in report language that this result was not intended, the practice continues unabated.** Such action is inconsistent with the notion that a final decree of divorce represents a final disposition of the marital estate. H.R. Rep. No. 665, 101st Cong., 2d Sess. 279, reprinted in 1990 U.S. Code Cong. & Admin. News 2931, 3005. (Emphasis added.)

The opinion of the Texas Court of Appeals for the Ninth District is the precise type of abuse Congress was attempting to curb by enacting the 1990 amendment.

In *Knowles v. Knowles,* 811 S.W.2d 709 (Tex.App.-Tyler, 1991) another Texas Court of Appeals held that a court could not partition a husband's military retirement benefits, as the decree of divorce had not reserved jurisdiction to treat any amount of retired pay and stated:

> [a]ppellant further argues that we should construe section 1408, as amended in 1990, to permit her recovery or her proper share of appellee's military retirement benefits accruing after June 25, 1981. In order to so construe the unambiguous language thereof, providing that, if the divorce decree "(A) was

> issued before June 25, 1981, and (B) did not treat (or reserve jurisdiction to treat) any amount of retired pay ..." then the state court may not "divide or partition any amount of retired pay of a member ..." We decline to do so.

Louisiana, another community property state has decided the issue in *Dunham v. Dunham,* 602 So.2d 1139 (La.App. 1 Cir., 1992). In that case the Louisiana court stated:

> Congress ... enacted the Uniformed Services Former Spouse Protection Act (USFSPA) to overrule *McCarthy.* The Act states that it applies to retirement pay periods after June 25, 1981. Accordingly, it was well established in Louisiana, as apparently it was elsewhere, that the USFSPA applied retroactively to a variety of fact situations. Indeed, it was the widespread practice of applying the statute retroactively that prompted the 1990 amendment, because Congress disapproved of the "reopening of divorce cases" through partition cases or otherwise to award former spouses shares in military retirement pay. (Cite omitted.)
>
> Accordingly, the issue in partition litigation subsequent to the 1990 amendment bars a case that in this state would have been "reopened" pursuant to a retroactive application of the USFSPA. In other words, can the 1990 amendment be applied retroactively to bar an action by a former spouse who, but for the amendment, would have been entitled to a portion of her former husband's military retirement pay? We conclude that the amendment applies retroactively to bar the action.

In *Johnson v. Johnson,* 824 P.2d 1381 (Alaska, 1992), it was held:

> [c]learly the 1990 amendment preempts any right to relief that [the former spouse] might have had under Alaska law because the 1977 divorce decree is a final decree, it was issued before June 25, 1981, and it did not treat, or reserve jurisdiction to treat, any amount of [the member's] retired military benefits as marital property.
>
> ...
>
> Although it is undoubtedly a hardship for [the former spouse], her arguments cannot overcome the clear language of the act.

It cannot be doubted that the 1990 amendment precludes the partition of military retirement pay sought by Respondent in this case. As stated in the dissenting opinion in the Court of Appeals "[o]ur trial court did not 'treat' (or reserve jurisdiction to treat) the military retirement subject matter. To hold that Texas Courts do so automatically, is a fiction which flies in the face of the preemptive nature of Section 1408(c)(1)."

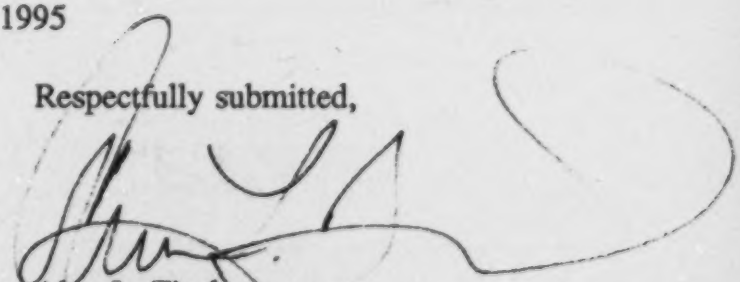
This Court should grant certiorari in this case to explicitly rule that Respondent's attempts at partition are preempted by the USFSPA.

CONCLUSION

For the reasons set forth above, a writ of certiorari should issue to review the judgment and opinion of the Court of Appeals in this matter.

DATED: July 25, 1995

Respectfully submitted,



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